

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1008

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

FRANK ALTESE, a/k/a Frankie Feets, et. al.,

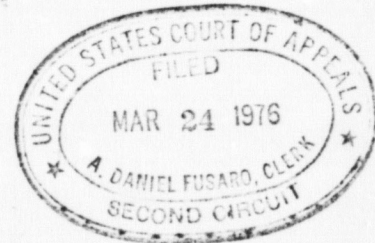
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
SABATO VIGORITO

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Appellees.

BRIEF FOR APPELLEE

Preliminary Statement

This brief is submitted on behalf of the appellee SABATO VIGORITO in support of the dismissal by Chief Judge Mishler of Counts 1 and 2 of the indictment.

Statement of Facts

The respondent VIGORITO was indicted together with approximately 21 others in a multi-count indictment. He was not named in all of the counts of said indictment. He was named in Counts 1, 2, 5 and 8. Count 5 charges respondent and others with directing, etc. a gambling operation from April 1973 to June 1973 in violation of Section 1955 of Title 18, U.S.C. Count 8 charges the respondent and others with a conspiracy to violate Section 1952 and Section 1955 of Title 18.

Count 1, which is the subject matter of this appeal, charges a violation of Title 18, U.S.C., Section 1962[c], ie., conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity and through the collection of unlawful debts. The nub of same being the gambling activity which it was contended was the racketeering activity and the collection of gambling debts which it is contended is by definition an unlawful debt. Count 2 charges a conspiracy to violate Title 18, U.S.C., Section 1962[c]. A pre-trial motion was made to dismiss those two counts on the general theory that it did not state a crime under the statutes invoked since the enterprise sought to be controlled by either racketeering activity or collection of an unlawful debt had to be a legitimate enterprise. The motion to dismiss the same counts was granted by Chief Judge Mishler and this appeal by the Government ensued.

POINT I

THE STATUTORY INTERPRETATION BY
THE COURT BELOW WAS CORRECT AND
SHOULD BE SUSTAINED.

In the heading of their Point I, the appellant contends that the interpretation below was too narrow; contrary to the express wording of the statute and most interestingly, it is claimed contravenes the "General Legislative Scheme of Title IX". Despite this last contention, appellant goes on to urge, if we understand their point correctly, that the Court need not even reach the question of legislative intent since the statute is so clear. In Point II, the

appellant suggests if legislative intent is reached, the intent was clearly toward proscribing the use of racketeering methods or collection of debts in both legitimate or illegitimate enterprises.

The question of what the statute means or intends to proscribe cannot be determined by the tunnelized view the appellant initially suggests and then abandoned in the previously quoted line from the heading of Point I.

Legislation of any kind is not created in a vacuum; it does not spring up like "Topsy". There is as a general rule a situation, a condition, a wrong, an inadequacy or call it what you will, that prompts either the private sector or some area of Government to propose legislation to cover or correct it. Such was the situation, of course, with the entire bill of which Section IX is but a part, ie., the so-called Organized Crime Control Bill.

Before we consider the few existing judicial decisions on the subject of Section IX, we should examine the colloquy, hearings, debate, proposed amendments and proposals that led to its drafting and ultimate enactment.

Although eschewing the need for examination of legislative intent, the appellant almost at the inception of its argument sets forth some language garnered from the prelude of the Bill to point to a broad interpretation. While this general language is certainly interesting, it neither focuses upon nor sheds any helpful light on the issue before the Court. It also skims over a page of more meaningful language in the prelude, ie.:

"The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact."

A reading of this prelude clearly supports the interpretation below because it indicates quite plainly "The General Legislative Scheme of Title IX"; it shows the concern with organized crime earning money through illegitimate sources, then in the words of subdivision (3) infiltrating and corrupting legitimate businesses with it and the consequences of same to the economic welfare of the Nation.^{1]}

^{1]} See also: The Yale Law Journal, Vol. 83:1491 (1974), Investing Dirty Money; Section 1962[a] of the Organized Crime Control Act of 1970.

This prelude really indicates the concern of the legislature, sketches the condition to be remedied and forecasts the nature and import of the legislation ultimately devised to accomplish that end.

Then, ensuing legislative debates echo the concern contained in subparagraph (3) of the prelude, i.e., the infiltration of legitimate business by organized crime through the use of monies earned in illegitimate enterprises. To get a view of the feeling of both houses of the legislature, we need merely consult the record of the hearing of the Committee on the Judiciary of the House of Representatives held before Subcommittee 5 on May 20, 21, 27; June 10, 11, 17; July 23 and August 5, 1970. Examination of that report, insofar as it applies to Title IX, makes abundantly clear that the concern expressed in subparagraph (3) of the prelude was the only thing sought to be corrected by Title IX.

At almost the very threshold of the hearing, Congressman McColloch from Ohio, one of the members of the Subcommittee, points out at page 78 of the record of the hearing before Subcommittee 5 that amongst the graver evils of organized crime is "...the infiltration into our economy". This theme is carried on by Senator McClellan, one of the moving forces behind the bill in the Senate, in his testimony before the Subcommittee, when he states on page 87 that the money allegedly covered by organized gambling bankrolls "...organized crime's infiltration of legitimate business and other activities, and this is one of the Nation's most serious criminal justice and economic problems".

He goes on in his testimony to give an example on page 87 of what he contends is the effect that mob money and methods as he puts it has on legitimate business, ie., the take over of the airport trucking industry in New York. The Senator went on to testify concerning each article of the bill and its purposes. At the outset of his discussion of Title IX, he stated on page 106:

"Title IX of S.30 is designed to prevent organized criminals from infiltrating legitimate commercial organizations with the proceeds of their criminal activities or with violent corrupt methods of operation, and to remove them and their influence from such enterprises once they have been infiltrated."

This served as the introductory paragraph to a continued lengthy discussion of the purpose, design and purport of Title IX and throughout the body of it were repeated statements such as the following which appears on page 107:

"The purpose of Title IX is to fill the gaps in our power to deal with criminal infiltration of legitimate organizations."

There can be no doubt after reading the Senator's discussion what the clear import and intent of Article IX was, and that it was fully in accord with the interpretation made by the Court below.

Senators McClellan and Hruska in a letter to the chairman of the judiciary committee on page 115 restate the purpose of Title IX "to provide new civil and criminal remedies to deal with the infiltration of legitimate organizations by organized crime."

The report of the American Bar Association - Section on Antitrust Law in their report on the bill contained on page 148 under the caption of need for legislation allude to the use of monies earned by organized crime to infiltrate and take over legitimate business.

They applaud the use of anti-trust law to reach the conduct of organized crime in legitimate business.

The then Attorney General Mitchell who was a moving force behind this type of legislation recognized on page 153 that organized crime invested a substantial portion of its income in a whole realm of small and middle sized legitimate businesses, and used the same practices therein. He went on at page 157 to specifically discuss Title IX and stated that its purpose was to protect legitimate businesses against the syndicate's infiltration. On page 170, he states categorically:

"Title IX is designed to inhibit the infiltration of legitimate business by organized crime..."

He goes on to demonstrate how it works, ie., prohibit the investment of funds derived from a pattern of racketeering, in such a way as to prevent the alleged criminal figure from controlling the business, thus purchase of stock in the open market is exempt unless it is of an amount which gives the individual control. Certainly, no argument can be raised that the then Attorney General was talking about the purchase of stock in the open market as a method to control an illegitimate enterprise. The last paragraph of his discussion of Title IX on pages 171 and 1/2 makes it clear that he is pushing for enactment of this Title to remove the alleged influence of so-called organized crime upon American industry, ie., legitimate businesses.

Congressman Halpern of New York in his statement to the committee echoed the concern, when he stated at page 286 that the profits derived from criminal activities are the fuel by which

criminals become involved in legitimate business.

The Association of the Bar of the City of New York through its Committee on Federal Legislation did a title by title critique of the Bill; in discussing Title IX, they referred to "an innovative and imaginative approach to the growing problem of organized crime's infiltration of legitimate business...". This analysis was repeated by their representative Sheldon Elsen who was chairman of the Bar Association Committee in his oral testimony at page 369 which refers to Title IX as an attempt to deal with the problem of infiltration of legitimate business by racketeers.

It is noteworthy to observe that these repeated statements made by a variety of witnesses of the purpose of Title IX, were never contradicted or corrected by any sponsors of the Bill or members of the Committee to widen the scope to include all types of enterprises.

Professor Schwartz in his statement before the Committee on page 384 refers to Title IX as the bill concerning illegitimate penetration of legitimate businesses.

Congressman Cramer from Florida in echoing the words of President Nixon viewed the bill as providing the procedures to eradicate organized crime and its threat to legitimate business (pages 394 and 395). He was quickly followed by Congressman Hogan of Maryland, one of the sponsors of Title IX, and he prefaced his remarks by observing ~~concerning~~ the influence that organized criminal elements are getting a foothold in legitimate business by investing the funds that they earn illegitimately in such businesses (p. 395).

Vincent Broderick in behalf of the New York County Lawyers Association referring to Title IX on page 401 refers to this as a recognition of the awareness on the part of all of us of the penetration by organized crime into our commercial life (p. 401).

Donald Taylor on behalf of the United States Chamber of Commerce notes the increasing inroads of organized crime into legitimate business and quotes with approval the previously cited statement of then Attorney General Mitchell (p. 408). Mr. Taylor's associate Mr. Kohn, chairman of the Crime Commission of New Orleans, spent most of his time talking about the infiltration of legitimate business by organized crime using as an example the alleged activities of certain persons in the New Orleans area. He submitted a series of articles which were written by a Mr. Kelly for the Hearst newspaper, the first of which dealt with the extensive infiltration of legitimate business by organized crime. Mr. Kohn at page 433 of his analysis of Title IX talks repeatedly of the operation of legitimate business by racketeers and their infiltration of the legitimate business world. Mr. Bellows, an attorney from Chicago, in an exchange with Congressman Poff, refers to Title IX as being intended to keep the racketeers out of legitimate business (p. 454). This evaluation is again made without contradiction or expansion by any member of the Committee. This same observation of the ill to be remedied and the purpose of Title IX, ie., infiltration of the business community by organized crime and its prevention, was made by Selman W. Samols, Esquire, on page 461.

Lawrence Speiser of the Washington office of the American Civil Liberties Union in his analysis of Title IX refers to it as making unlawful the use of income obtained from unlawful activities in any legitimate business.

In a letter to the Committee Senators Bible and Cannon from Nevada state the purpose of Title IX as:

"...the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."
(p. 510).

Congressman Steiger of Arizona expressed his enthusiastic support of Title IX which is designed to prevent and reverse the corrupt infiltration of legitimate business by organized criminals (p. 519). He went on to give an example of such enterprise from a prior speech made on the floor of the House.

Congressman McDade of Pennsylvania commented on the ability of organized crime to invest in hitherto legitimate business as being one of the main evils to be corrected by the legislation (p. 594).

The Counsel to the Committee, Mr. Zelenko, in the course of questioning Will Wilson of the Justice Department alluded to Title IX as the section which "deals with racketeer infiltration of legitimate businesses". (p. 662). In his continued questioning of Mr. Wilson, he refers to two necessary elements of proof in connection with Title IX, lists the second of such elements as "proof that proceeds from such activity (illegal) were used or invested in the acquisition of a legitimate business". (p. 663). Mr. Wilson in response to these questions makes it clear by the example he gives, ie., investment of illegal monies in a legal cartage company, that it is designed to prevent infiltration of legitimate business by racketeers (p. 663). Mr. Zelenko in further questioning of Mr. Wilson

concerning the necessity of two or more racketeering activities and the need for them to be closely linked timewise, refers to the connection between such activities and the investment of the proceeds in and subsequent control of legitimate business (p. 665).

Mr. Charles Rogevan, a former Assistant Director of the President's Commission on Law Enforcement comments on Title IX and lauds the purpose of that Title as being most useful against organized crimes' infiltration of legitimate business activity (p. 687).

The private corporate organization Intertel in their letters to the Committee refers to Title IX as barring the use of illegal monies to acquire, operate or set up legitimate commercial enterprises (p. 668). Amongst the exhibits before the Committee was the report of the President's Commission on Law Enforcement on Administration of Justice in 1967 which concluded that the lax attitude of the business community allowed infiltration of legitimate business by the organized criminal element.

All of the testimony before the Committee and every exhibit that referred to Title IX cited the evil to be cured as the infiltration of legitimate business and the purpose of that Title to be to prevent the infiltration of legitimate business or, if accomplished, to correct it. There was not one word of testimony or one exhibit that I could find in that Committee's report to indicate that any other enterprise was involved other than a legitimate enterprise. That it why, to answer the rhetorical question posed by the appellant, the legislature did not preface the word enterprise with legitimate, because it was taken for granted that this was the sole evil and that

was the sole purpose of the bill. It was so apparent that it did not need a preface, because it was not envisioned that any prosecutor would attempt a bootstrap operation and ignore the obvious purpose as stated by all of the heads of their own office, ie., the infiltration of legitimate business.

In addition to the unanimous clearly stated purposes of the bill, its very contents and common logic support the interpretation below.

For example, the bill in defining enterprise talks about partnerships, corporations, associations or other legal entities. What in heavens name could such entity refer to other than a legitimate business? In subdivision (a) of Section 1962, it refers to the purchase of stock on the open market and the amount necessary to constitute control. Is the appellant suggesting that what was considered was the sale on the open market of stock in an illegitimate enterprise?

Section 1963, which prescribes penalties of forfeiture, talks in terms of interest in security, property or contractual right. Those are certainly not terms associated with illegitimate enterprises.

The entire civil divestiture procedure under Section 1964 can only be viewed as involving interests in legitimate businesses.

Thus, what we have is not a case of narrow construction by the Court below, but an attempt by the appellant to twist a statute, to enlarge the punishment provision of already proscribed criminal activity, ie., gambling from 5 to 20 years, by a tortured attempt to include that ultimate illegal enterprise as the infiltrated enterprise intended in Section 1962. One might ask the appellant if

that was the intention of the legislature, why did they not simply make the penalty under Title VIII, which dealt with gambling, 20 years?

The judicial decisions that ensued must be viewed against this backdrop of clear legislative expression.

The first reported decision that we could find dealing with the statute was *U.S. v. Amato*, 367 F.Supp. 547 (S.D.N.Y. 1973). Judge MacMahon, in denying a motion to dismiss an indictment charging a violation of Section 1962, stated on page 549:

"Section 1962 makes it unlawful to invest the proceeds of racketeering in legitimate business..." (Emphasis supplied).

The brevity of the conclusion bespeaks a recognition of the obviousness of the contents, purpose and legislative history of Title IX.

U.S. v. Parraso, 503 F.2d 430 (2 Cir. 1974) is cited by the appellant to support their position. We contend the contrary. That case was a classic example of what the statute envisioned a legitimate enterprise; a hotel in the Antilles was taken over by racketeering methods. The only issue before that Court was the narrow one of whether since the hotel was not in the United States, did its take over sufficiently affect interstate or foreign commerce. The Court rejected that attempted construction and in so doing set forth a statement in footnote 11 on page 435 as follows:

"We reject out of hand the claim that the activities of Hotel Corp. did not have the requisite effect on interstate or foreign commerce. It was owned by Goberman, an American citizen. It was financed by Pennsylvania banks and Massachusetts businessmen. It had numerous domestic creditors. It served primarily American tourists. And its accounts were payable in U.S. dollars to Olympic, a New Jersey corporation."

We submit that the above supports our argument that the statute plainly involves the take over of legitimate enterprises. The Court went on to cite with approval language in the House Report referring to any acquisition which meets the test of subsection (b) -- what could they mean by use of a term such as acquisition other than a legitimate enterprise. If any further expression was required that the Court felt that the statute was intended to prevent the "infiltration" of legitimate business, then it was certainly supplied on page 439 in the following statement:

"In short, we find no indication that Congress intended to limit Title IX to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise. We reject any such construction." (Emphasis supplied).

The Court in this passage clearly showed that the ultimate repository of the illegal money in their view had to be a legitimate enterprise, when they use phrases like "ravage the American economy"; "infiltration of domestic enterprises".

Would they use a phrase like "infiltration" if they were seeking to protect an illegitimate enterprise?

That case did not deal with the question of whether the ultimate enterprise was limited to legitimate enterprise but actually with the issue that once the ultimate enterprise is a legitimate enterprise, racketeering methods were used to take it over and it affects interstate and foreign commerce, it violates the statute. The physical situs of the legitimate business on an island off our Coast will not exempt the criminal activity.

The appellant's reliance on U.S. v. Cappetto, 502 F.2d 1351 (7 Cir. 1974) is misplaced since it opts in favor of the broad construction of enterprise in reliance upon legislative intent which is applicable to Section 1955 not Section 1962.

In addition to the decision below, Judge Newman in U.S. v. Moeller, 402 F.Supp. 59 (D. Conn. 1975), in his decision, conducted an extensive analysis of the purpose and intent of Title IX which supports our contention. The decision in U.S. v. Castellano, 75 CR 521 (Bartels, J., E.D.N.Y. 1975), which reaches an opposite conclusion places its reliance upon the decision in U.S. v. Cappetto (supra) which as previously noted uses the expression of legislative intent applicable to Section 1955 rather than that applicable to Section 1962.

In its brief, the appellant, as previously noted, disclaims the need to examine legislative intent on the grounds that the statute is clear because it merely uses the word enterprise and the only recourse to legislative intent is where there is ambiguity. It would seem that the interpretation of Chief Judge Mishler, Judges Newman and MacMahon on one side and Judge Bartels on the other at least indicate ambiguity. Beyond this, however, where statutes are being interpreted, obviously legislative intent must be immediately considered and given great weight. This principle was recently stated by the Supreme Court in Philbrook v. Glodgett, ___ U.S. ___, 95 S.Ct. 1893 (1975) at page 1898, in language admirably applicable and dispositive of the issue at bar:

"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." United States v. Heirs of

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Boisdore, 8 How. 113, 122, 49 U.S. 113, 12
L.Ed. 1009 (1850). Richards v. United States,
369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492
(1962); Chemehuevi Tribe of Indians v. FPC,
U.S. , 95 S.Ct. 1066, 43 L.Ed.2d
272 (1975). Our objective in a case such as this
is to ascertain the congressional intent and give
effect to the legislative will. The language of
§ 407(b)(2)(C)(ii) certainly leans toward the
construction adopted by the District Court, but
"[i]t is a familiar rule that a thing may be
within the letter of the statute and yet not
within the statute because not within its
spirit nor within the intention of its makers.""

Adherence to that principle mandates resort to legislative
intent and as previously indicated at some length examination of the
Subcommittee 5 report mandates the construction given by the
Court below.

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CONCLUSION

THE DECISION OF CHIEF JUDGE MISHLER SHOULD BE
AFFIRMED.

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